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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 44.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

No. 45.

THE UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY, *et al.*,
Appellees.

REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES.

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E. T. MILLER,
M. G. ROBERTS,
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October 18, 1930.

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REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES.

COMMENT ON VARIOUS STATEMENTS IN THE BRIEF OF THE WESTERN TRUNK LINES.

We wish to call attention to a number of statements in the brief of the Western Trunk Lines which, we fear, are likely to prove misleading.

(1) The losses in revenue of the individual Southwestern respondents, shown in the evidence, were net losses to them.

Some of the statements in the brief give the impression that it is entirely problematical whether any particular Southwestern line will lose or gain revenue as the result of the Commission's order. Counsel say (p. 24):

> Nor does the order of the Commission produce the results alleged by appellants at pages 43, *et seq.*, of their brief. It does not require Kansas City, Mexico & Orient Railway, the St. Louis Southwestern Railway Company of Texas, the Kansas, Oklahoma & Gulf Railway, and the Louisiana Railway & Navigation Company to pay any amounts to any railroad in Western Trunk line territory, and does not require the Missouri-Kansas-Texas Railroad or the Kansas City Southern to pay the amounts mentioned by appellants to the Illinois Central and Burlington. As we have heretofore pointed out, the order only relates to the division of total revenue at the junctions where the traffic is interchanged between the Western Trunk lines and the Southwestern lines. As we have also pointed out, the divisions of the Western Trunk lines are not increased on all traffic.
>
> In cases where the order increases the revenue of the Western Trunk lines, the Southwestern lines which will lose money cannot be determined until a subdivision of revenue is agreed upon by the Southwestern lines.

The statement introduced in evidence on behalf of The Kansas City Southern Railway Company (R. 1229) showed a net loss in revenue of $211,337.04 per annum resulting to that company (including its Texas subsidiary) on account of the challenged order; the estimate being based on the business for the month of September, 1928. As stated in a note (R. 1230):

> This statement includes only changes in K. C. S.-T. & F. S. revenues; it does not include additional increases and decreases which will accrue to the Western Trunk Line railroads from other South-

western roads which may have participated in any of this traffic.

The witness testified that if the Commission's order was also applied to revenue from traffic originating and terminating on the non-respondent lines in Southwestern territory and Western Trunk Line territory, the loss to The Kansas City Southern Railway Company would amount to $361,282.88 per annum, instead of the $211,337.04 per annum shown in the above statement.

The statement of the Missouri-Kansas-Texas Railroad Company, including the Missouri-Kansas-Texas Railroad Company of Texas (R. 1231-1233), showed the entire detail of the estimate of the loss in revenue of that company that would be occasioned by the enforcement of the order. It gave the increases and decreases in revenue, and the resulting net loss.

The statement introduced on behalf of the Texas & New Orleans Railroad Company (R. 1233, 1234) did show the loss of the Southwestern carriers as a whole on account of the Commission's order; but the statements introduced by the Kansas City Southern, the Missouri-Kansas-Texas and the Louisiana Railway & Navigation Company (R. 1234) showed only the net losses of those particular lines.

With reference to the Kansas, Oklahoma & Gulf Railway and the Louisiana Railway & Navigation Company, the point made by the Western Trunk Lines is that neither of those railroads reaches with its own rails the gateways at Kansas City and St. Louis. The order of the Commission, however, by its express terms, does not apply to all the joint traffic through those gateways, but only to such traffic as originates or terminates on the line of one of the respondents. As to such traffic originating or terminating

on the line of the Kansas, Oklahoma & Gulf Railway or the Louisiana Railway & Navigation Company, the Western Trunk Lines cannot seriously contend that the divisions of those railroads would not be reduced. The statement of the Louisiana Railway & Navigation Company (R. 1234) shows that its net loss on account of the divisions order, based on business for the month of September, 1928, will amount to about $670.00 per annum.

The net loss in revenue of all the respondent Southwestern Lines under the order as it now stands is shown for the month of September, 1928, in Exhibit 10, facing R. 1226. This includes, in the main, the direct loss in revenue of those carriers on interchange traffic having origin or destination on their lines. As a matter of lesser importance, it also includes the loss in revenue sustained by the respondent Southwestern Lines where the non-respondent Southwestern Lines act as intermediate carriers of traffic having origin or destination on a respondent Southwestern line, and the effect of which is to reduce the divisions of the intermediate non-respondent carriers, and also the divisions of the respondent carriers over which the shipment moves.

The same exhibit shows the loss in revenue that will be sustained by the non-respondent Southwestern Lines for the same period if the Commission's order is extended to them, as counsel for the Western Trunk Lines insists will be done. In this statement is also included, although not separately stated, the additional loss of the respondent Southwestern carriers which they will sustain over and above the loss they now stand to suffer under the order as it stands. This additional loss will arise from the extension of the order so as to include traffic having origin or

destination on the lines of the non-respondent Southwestern carriers. As to this traffic, it will be remembered, the old divisions remain in effect, notwithstanding the order. If those divisions are reduced by the extension of the order to the non-respondent carriers, the divisions of the respondent carriers as to traffic of this nature passing over their rails will also be reduced. To illustrate by a concrete instance, we take the Midland Valley, which is a non-respondent Southwestern carrier. A considerable amount of the interchange traffic in question has origin or destination on the Midland Valley and passes over the Kansas City Southern. On this traffic the old basis of divisions is still in effect, and is not affected by the terms of the order, because it does not have origin or destination on the Kansas City Southern, which is a respondent; its origin or destination being on the Midland Valley, a non-respondent. But if the Commission's order is extended to the Midland Valley, the reduced divisions will, of course, affect the Midland Valley, and as the traffic passes over the Kansas City Southern as an intervening carrier, the latter's divisions will also be reduced.

(2) The Commission's omission to make all interested carriers parties to the proceeding.

Since this matter has a bearing on various contentions made by the appellants, we wish to add a few words of explanation.

The Commission's order of October 8, 1923 (R. 1169-1170) was to the effect that evidence would be received only with respect to divisions between Western Trunk Line territory and Southwestern territory; and the natural inference therefrom would be that the Commission intended

to investigate the divisions upon all the joint traffic between those territories, as they were defined by the Commission, "with a view" to prescribing just and equitable divisions, if those in effect were found to be unreasonable. The Commission omitted, however, from the list of respondents a large number of Class I railroads, which have considerable mileage in the territory which it had designated as Western Trunk Line territory. To mention only a few, for illustration: the Pennsylvania Railroad; the New York, Chicago & St. Louis Railroad; the Cleveland, Chicago, Cincinnati & St. Louis Railway, and the Louisville & Nashville Railroad have lines of railroad extending from St. Louis entirely across the State of Illinois, in this Western Trunk Line territory; but none of them were made parties respondent.

Counsel for the Western Trunk Lines (R. 436-437) put in evidence a list of what he termed the principal carriers in Southwestern territory and Central Western and Northwestern territory, which latter territories include the Western Trunk Line territory as designated by the Commission. In that list were included, as principal lines in those territories, the following carriers which were omitted by the Commission from this proceeding:

In Western Trunk Line territory—

Duluth & Iron Range Railroad
Duluth, Missabe and Northern Railway
Duluth, South Shore and Atlantic Railway
Duluth, Winnipeg & Pacific Railroad
Green Bay and Western Railroad
Lake Superior & Ishpeming Railroad
Chicago, Peoria & St. Louis Railroad.

And in the Southwestern territory—

Fort Smith and Western Railway
Forth Worth & Rio Grande Railway
Louisiana & Arkansas Railway
Midland Valley Railroad
Missouri and North Arkansas Railway
Texarkana and Fort Smith Railway
Trinity & Brazos Valley Railroad
Wichita Valley Railroad.

The list printed as Exhibit A to our original brief shows the large number of other railroads which have lines in Southwestern territory and Western Trunk Line territory which were also omitted. The order of the Commission applies to only two-thirds of the joint traffic (Exhibit 10, opposite R., p. 1226).

Counsel, at page 11 of their brief, say:

> * * * It is said that the Louisiana & Arkansas Railway, Midland Valley Railroad and the Texarkana & Fort Smith Railway will not be required to pay increased divisions to the Western Trunk lines under the Commission's order, since they are not respondents, and that the Louisiana Railway & Navigation Company, Kansas, Oklahoma & Gulf Railway and Kansas City Southern Railway will be required to pay, as they are respondents. This is not a correct statement of the effect of the Commission's order.
>
> The order only deals with the divisions north and south of Kansas City, St. Louis, East St. Louis, Cairo, Gale and Thebes (R. 109). These are the junctions upon which the divisions between the Southwestern lines and Western Trunk lines are made. The order does not relate to and does not affect the subdivisions of the revenue north and

south of those junctions, nor was it necessary that it should.

Our statement was substantially correct. The order, by its terms, does not change the divisions as to traffic originating or terminating at points on the lines of the Louisiana & Arkansas Railway, Midland Valley Railroad, and the Texarkana & Fort Smith Railway since they were not respondents in the proceeding. If the last-named railroads should be intermediate carriers of any shipment to which the order applies (because the shipment originates or terminates on the line of a respondent), it is assumed, as above stated, that their divisions will be reduced proportionately on that traffic which is probably small in amount, but the statements of net loss of Kansas City Southern, Missouri-Kansas-Texas, etc., as above stated, include this element of loss to the non-respondent carriers. On the point which we were bringing out, however, our statement was entirely correct; that is, that as to traffic originating or terminating at points on those non-respondent railroads the Commission's order does not change the present divisional basis.

We did not assume that the order requires an increase to the Western Trunk Lines on all traffic, as stated on page 11 of the brief. The statement contained in Petitioner's Exhibit 10 (R. 1226) and the statements of the individual carriers which were introduced, showed the net loss after giving effect to increases as well as decreases. With reference to the statements on this subject which were introduced by the appellants, they constitute a careful and thorough estimate of the result of the Commission's order, and no evidence was introduced which even tended to show that they were not substantially correct.

(3) Substantially all of the Southwestern respondents except those that also have important lines in the Western Trunk Line territory joined in the suit.

Counsel on page 12 of their brief say:

> Included in the list of carriers which have not attacked the Commission's order are such important lines as the Atchison, Topeka & Santa Fe Railway Company; Chicago, Rock Island & Pacific Railway Company; Chicago, Rock Island & Gulf Railway Company; Gulf, Colorado & Santa Fe Railway Company, and Panhandle & Santa Fe Railway Company.

All of the railroads above named are parts of the Santa Fe System and Rock Island System, both of which, as stated by the Commission, have important lines in both territories (R. 58). The only other Southwestern respondents which did not join in this suit were the Kansas City, Mexico & Orient, which has now become a part of the Santa Fe System, and the Vicksburg, Shreveport & Pacific Railway, which has now become a part of the Illinois Central System, a Western Trunk Line respondent, and the Kansas, Oklahoma & Gulf Railroad, a small independent carrier.

(4) Appellants have contended at all times that the evidence was insufficient.

The Western Trunk Lines, at page 16 of their brief, say:

> It should be observed that appellants nowhere contend that the record did not contain the evidence which they claim the Commission should have considered but did not.

We have pointed out in our original brief numerous instances where we contend the record is not sufficient to

sustain the Commission's findings and order. We have contended that the order is based upon group averages, and not upon a consideration of the financial and operating conditions of the individual carriers, as the statute requires; that there was no evidence in the record as to the cost of operations, earnings and other data with respect to the interchange traffic in question; that there was no evidence on which the Commission could form a judgment as to a fair return on the property of each carrier employed in the interchange traffic in question; that there was no evidence to support the Commission's finding or assumption that the average hauls of the Western Trunk Lines and Southwestern Lines were substantially the same; that there was no evidence to justify the Commission's assumption that the application of its formula would result in giving to the Southwestern carriers the revenue which its findings indicate they should receive; and other matters.

We respectfully dissent from the further statement (p. 16):

> In fact, they have gone to some pains to demonstrate that the record was complete with respect to the rates, divisions and other facts relating to each individual respondent.

Counsel, at page 49 of their brief, say:

> * * * it should be remembered that appellants were as much respondents in the proceeding before the Commission as the Western Trunk Lines, and were under the same obligations with respect to the introduction of testimony if they desired to retain the divisions they were then receiving.

This Court has made it clear that there has been no such reversal in the rule as to the burden of proof. The Com-

mission could not lawfully make an order granting increased divisions to the Western Trunk Lines and taking such revenue from the Southwestern carriers unless there was sufficient evidence to support the order of the Commission. The Western Trunk Lines, as beneficiaries of the Commission's order, were under the obligation of introducing evidence sufficient to support it. This is made clear by the Court's decision in *U. S.* v. *Abilene & Southern R. Co.*, 265 U. S. 274, 289, where this Court says that every case is an adversary one which takes property from one carrier and grants it to another, and the burden of proof is upon the carrier which benefits by the Commission's order.

The Western Trunk Lines, on page 28 of their brief, say:

> Appellants fall into the initial error of assuming that the order of the Commission was made primarily to relieve the financial necessities of the Western Trunk Lines, whereas, this is not the case.

If the order is not based upon financial conditions, there are no findings by the Commission fixing any basis of divisions. The Commission ascertained as the best basis of comparison the amounts required to pay operating expenses, taxes, and other like charges, and a fair return on investment. That has to do with financial conditions.

I.

The Appellees have failed to sustain the Commission's action in issuing a group order based on average conditions, or to justify the arbitrary and inequitable results that flow from its application.

While conceding that the divisions in question were dealt with by the Commission on a group basis, in the light of average group conditions, appellees make no effort to justify the Commission's action on reason or principle, but content themselves with a reference to the *New England Divisions* case, 261 U. S. 184. They contend that that case is conclusive of the one under consideration. But an examination of that decision discloses that it does not decide the question which this Court is called upon to determine, and hence cannot be controlling here.

In the *New England Divisions* case it may be said, in passing, the equities were strongly in favor of the New England lines. They were shown in *Ex Parte* 74, 58 I. C. C. 220 (62 I. C. C. 522), to be entitled, as a group, to a 47.40 per cent. increase in their rates; carriers in Trunk Line territory to a 29.76 per cent. increase; and carriers in Central Freight Association territory to a 24.31 per cent. increase. But the New England carriers were included in the Eastern group, and could not be dealt with separately. The Commission ordered that freight rates in the Eastern group be raised 40 per cent., which was about 15 per cent. higher than would have been awarded except for the inclusion of the New England group. Thus, it appeared that the New England lines, because of their inclusion in the Eastern group, received a smaller increase than they were justly entitled to, and the other carriers in the group, by

reason of such inclusion, received about 15 per cent. more than they were entitled to. This excess approximated $25,000,000. The carriers west of the Hudson River, therefore, became, in a sense, trustees for the New England carriers in said sum, and the effect of the divisions order of the Commission was, in substance, to execute the trust and to require the Western carriers to pay over to the New England carriers a 15 per cent. increase in the divisions of the several New England lines. This Court evidently thought that this adjustment should have been made by the Commission in *Ex Parte* 74. The Commission's action, which this Court approved, was in the nature of a *nunc pro tunc* order. Conceivably, this Court's decision might have been placed on this ground alone.

It is true that this Court approved the use of evidence of divisions typical in character and ample in quantity to justify a finding made with respect to each division of each rate of every carrier. As this Court said later, in the *Orient Divisions* case, 265 U. S. 274, 291, "the power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just". Obviously, it is unnecessary that all of the millions of divisions should be introduced in evidence, and considered and determined as separate problems. Substantial justice may be done if sufficient joint rates and divisions are introduced as to be fairly typical of all. In that manner, through both direct and indirect evidence, all joint rates and divisions are before the Commission and may be properly dealt with.

But the problem of determining just, reasonable and equitable divisions of joint rates does not stop with proof of existing joint rates and divisions. Another step of even

greater importance must be taken before the Commission is authorized to proceed to a determination of the issue. The carriers themselves must be considered. The statute (Section 15 (6)) by express command, enjoins this step, and makes each carrier a separate problem. Evidence must be directed to the operating and financial conditions of each carrier, party to the joint rates in question. The finding and judgment of the Commission must be responsive to such evidence. It is conceivable in theory, at least, that a group of carriers may be so similar in their financial and operating conditions that, upon proof that such is the case, evidence of one or more may be introduced which would fairly represent the financial and operating conditions of all. In other words, it may be possible, where the facts warrant, to receive typical evidence applicable to all carriers in each group. It is conceivable that the Commission may have been justified, particularly in the absence of protests to the contrary, in dealing with the New England lines as essentially similar for all purposes of the proceeding. Certainly, they were alike in their need of financial assistance and in their equitable right to the trust funds collected for their account by the carriers west of the Hudson River. There was likewise a similarity of operating conditions, which the Commission took pains to point out (66 I. C. C. 199), as follows:

> Complainants perform their part of the interchange service under less favorable conditions than their connections west of the Hudson River. They are terminal lines; their hauls are short; their traffic splits at frequent junction points and is diffused over many secondary and branch lines; their trainloads are necessarily relatively light; the density of their freight traffic is relatively low; and while their

investment per mile of road is low, their investment per revenue ton-mile is relatively high. Moreover, no coal mines are located on their rails, and fuel and many other supplies must be brought from considerable distances.

But it is inconceivable that the carriers in Western Trunk Line territory, on the one hand, or carriers in Southwestern territory, or the other, can be regarded as so similar in financial and operating conditions that one or more carriers in either group may be regarded as typical of the others in the group, or so nearly identical as to warrant or justify dealing with all in one group upon a group basis. Each of the two groups contains prosperous carriers, bankrupt carriers, and carriers with varying degrees of financial strength ranging between these two extremes.

How can it be said that any one or more of the carriers in Western Trunk Line territory is typical of the others for the purpose of fixation of divisions under the statute? Is the Chicago & Alton, which is in receivership, typical of the prosperous Burlington? Is the prosperous Illinois Central typical of the Minneapolis & St. Louis, also in receivership? Does proof of the financial and operating conditions of one or more of these lines fairly reflect the financial and operating conditions of the others? Surely, no one will answer these questions in the affirmative.

Will any one contend that any one or more of the carriers in Southwestern territory can be regarded as typical of the others for the purpose of fixation of divisions under the statute? Are the five carriers operating at a deficit to be regarded as typical of the others in the group enjoying a moderate degree of prosperity? Will proof of

the financial and operating conditions of any one or more of the carriers fairly reflect the financial conditions of the others? Merely to ask the question is to answer it.

It should require no argument to demonstrate that the application of the same yardstick to prosperous and bankrupt carriers alike can only result in a miscarriage of justice and a signal defeat of the purposes of the Transportation Act. The *New England Divisions* case gives no support to the theory that the rule of typical evidence may be applied to a group of carriers widely dissimilar in all their characteristics.

The shocking results that inevitably flow from the Commission's group order, based upon average group conditions, are such as instantly to condemn it. Among the carriers in the Western Trunk Line group who are beneficiaries of the Commission's order are the Santa Fe, which for years has been paying 10 per cent. dividends on its common stock in addition to a dividend of 5 per cent. on its preferred stock; the Illinois Central, which has been paying dividends continuously since February 2, 1863—its dividends on its common stock for the past 13 years being at the rate of 7 per cent. per annum; the Burlington, which has paid dividends continuously since 1881, and for the past 9 years at the rate of 10 per cent. on its capital stock; and the Rock Island, which pays dividends at the rate of 7 per cent. on its common stock, and also dividends of 6 and 7 per cent. on its preferred stocks (Poor's Manual). (The Santa Fe and the Rock Island, while in both groups, benefit as Western Trunk Lines from the reduced divisions of the other southwestern carriers.) No intelligent person will claim that these four carriers are in need of financial assistance at the hands of less prosperous carriers. But

their right to have their revenues still further swollen by contributions from less prosperous carriers in Southwestern territory is "definitely fixed" (261 U. S. 202) by the Commission's order which prohibits them from receiving or accepting divisions on any other than the prescribed basis. Even the five carriers in the Southwestern territory operating at a deficit, as shown in our original brief (pp. 15-16), are required to make their contributions. Two beneficiaries of the order, the Soo Line and the Rock Island, are "demanding nothing and not in need" to quote from the *Brimstone* case, 276 U. S. 104, 116. The former "took no part in the case" (R. 58, note 5), and the latter was "neutral" (R. 58). But both are awarded increased revenues at the expense of the Southwestern carriers. It appears from page 10 of Exhibit A-124, facing R. 512, that excluding the Santa Fe and Rock Island from both Southwestern territory and Western Trunk Line territory, the average dividends paid on their capital stock by the Southwestern carriers for the six-year normal period, 1916-1924, was .73 of one per cent.; and that the average dividends paid by the Western Trunk Lines during the same period was 4.28 per cent. The unequal and inequitable result of the application of the Commission's order can only be characterized as fantastic.

If the Burlington, Illinois Central, Rock Island and Santa Fe, or some one or more of them, had been located in the New England territory, is it conceivable that this Court would have approved a drastic divisional order increasing their divisions by 15 per cent., at the expense of the carriers west of the Hudson River, a majority of which, we venture to say, were earning substantially less than the carriers named?

One of the prominent provisions of the Transportation Act, says this Court in the *New England Divisions* case (p. 190) was "specially designed to secure a fair return on capital devoted to the transportation service". The order in the present case offends against this purpose of the law in two important and vital matters. As applied to Southwestern territory, it makes the poor poorer; and as applied to Western Trunk Line territory, it makes the rich richer. No justification can be found for an order which causes such an arbitrary and mischievous result.

But it is urged by the Commission (p. 20) and said by the lower court (R. 1328), that the Commission's order does not preclude individual Southwestern Lines from hereafter showing the Commission any injustice that may result from its application. This argument rests upon the terms of the order which is to remain in effect until the further order of the Commission. The *New England Divisions* case and the *Orient Divisions* case are relied upon.

The general scope of the Commission's report in the *New England Divisions* case was provisional, rather than final. It was to "grant immediate relief, subject to later readjustments" (66 I. C. C. 204), and the order "left the door open for correction upon application of any carrier in respect to any rate" (261 U. S. 187). In the *Orient Divisions* case the order expressly "permitted any carrier to except itself from the order in whole or in part by proper showing" and expressly retained jurisdiction in the Commission for future adjustments.

We have a different situation in the present case. The Commission's reports and its orders both indicate an intention to finally settle and adjust all questions of divisions between the respondent carriers. It does not appear from

the Commission's reports that any further proceeding is contemplated. There was no provision permitting any carrier to except itself from the effect of the order. Nor was there any retention of jurisdiction by the Commission. It is conceivable that the Western Trunk Lines may petition the Commission to extend the reduced divisions to the non-respondent Southwestern carriers. If they should do so and be successful in their efforts, as we have pointed out above, the effect of extending the reduced divisions over respondents' lines, where they are not now in effect, would be to still further reduce the divisions of the Southwestern respondents. It could not possibly increase them.

Certainly, the order, in so far as it affects the rights of Western Trunk line carriers, is a finality. Their divisions were "definitely fixed" by the order, precisely as this Court said the divisions of the New England lines were definitely fixed by the order in their favor (261 U. S. 202). The Western Trunk Lines are required (R. 113) to cease and desist from collecting or receiving divisions upon any other bases.

The fact that the order stated that it was to continue until the further order of the Commission does not indicate any different purpose or intention. That is a routine expression and adds nothing to the inherent power of the Commission to modify any order on good cause shown.

II.

Appellees' argument in support of their contention that the order of the Commission does not operate to confiscate the property of appellants is based upon their claim that there was no evidence before the Commission indicating what constituted a fair return on appellants' property employed in the interchange service in question. If this contention is correct it necessarily follows that the Commission failed to follow the positive command of the statute in that respect, and for that reason its order is invalid.

We contended in our original brief that the Commission's order confiscated the properties of appellants, and that this was proven by the Commission's figures, showing the recorded investments of the different carriers and the small rates of return thereon, which were even then non-compensatory; and by the fact that the Commission's order would still further reduce an already inadequate return. We added that if the recorded investment in railway properties is not to be accepted as value in this case, it must necessarily result that the Commission had no evidence of value before it, and it could not, and did not, therefore, give consideration to "a fair return upon the railway property held for and used in the service of transportation".

Appellees, and particularly the Western Trunk Lines, now take the position in their brief (p. 30) that there is no evidence in the record indicating the value of the property employed in the interchange service in question; nor any evidence of the cost of handling that traffic, and that

there is no evidence of the net return therefrom. They say (p. 30):

> The record contains no segregation of investment chargeable to the traffic affected by the Commission's order, no segregation of the cost of handling that traffic, and no segregation of the net return, derived from handling that traffic, upon the investment chargeable thereto.

If appellees are correct in their contention, then it was obviously impossible for the Commission to obey the mandate of the statute to give consideration to "a fair return on their railway property held for and used in the service of transportation". Congress imposed this duty upon the Commission in plain and unambiguous terms, and the carriers have a clear right to demand compliance therewith. That a failure to comply with the statutory command invalidates its order is too clear for argument. In the *O'Fallon* case, 279 U. S. 461, it appeared that the Commission was required by the statute to give due consideration "to the elements of value recognized by the law of the land for rate-making purposes". It failed to do so, and its order was set aside. The Court said:

> Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid.

There is no doubt that the statement of counsel above quoted is literally true; and it must also be true that if the Commission's computations above referred to are to be taken as a compliance with the terms of the Act, requiring consideration to be given to "a fair return", they are con-

clusive evidence that no such return was realized. If, on the other hand, these computations are not to be taken as evidence of a compliance with the Act in this respect, then there was no evidence before the Commission from which it could give consideration to "a fair return"; and, consequently, it did not do so. In the one alternative, confiscation is shown; in the other alternative, the failure to obey the command of the Act is proven. In either event, the Commission's order cannot stand.

III.

The Western Trunk Lines are in error in claiming that the divisions of the Eastern carriers are not involved in this proceeding, and that such carriers are not necessary parties.

It appears to be agreed that the junctions where the joint rates are divided, as between the Southwestern carriers and the Eastern carriers on the joint traffic to and from Eastern territory, is St. Louis, and that the agreement for the division of revenue from such joint rates is made between the Southwestern carriers and the Eastern carriers. It also appears to be agreed that the same divisions apply to the Mississippi River crossings north of St. Louis. It is true, as the Western Trunk Lines state, that the Western Trunk Lines perform a service of transporting shipments west of this Mississippi River crossing; for example, Hannibal, Quincy, Davenport, Savanna and Dubuque. And it is also true that the Western Trunk Lines transport these shipments for the Central Freight Association carriers across the State of Illinois to and from these upper Mississippi River crossings.

Counsel for the Western Trunk Lines erroneously states that only the service from these Mississippi River crossings westward is involved. Under the express terms of the Commission's order, the assumed rate which is to be used in determining the Western Trunk Lines' proportion of the revenue from the joint rates is the entire haul of the Western Trunk Lines in Western Trunk Line territory; and this includes the entire State of Illinois, which is east of these Mississippi River crossings. For illustration, the Southwestern scale controls the Western Trunk Lines' revenue between the Kansas City gateway and their connections with the Eastern carriers. This, of course, includes the transportation performed by the Western Trunk Lines east of the Mississippi River.

Leaving out of view, for the moment, the service performed by the Western Trunk Lines west of the Mississippi River, it is clear that the Commission's order increases the divisions of the Western Trunk Lines east of the river, including, as above stated, the State of Illinois. The Southwestern scale is to control these divisions east of the river, as well as those west of it.

But the compensation which the Western Trunk Lines have been receiving for their service east of the Mississippi River was fixed by contract between the Western Trunk Lines and the Eastern carriers. The Eastern carriers received the entire divisions for the transportation east of the Mississippi River, and they made an agreed allowance to the Western Trunk Lines for their transportation service between the Mississippi River and connections with their lines in Chicago and other points in Illinois. This contract between the Eastern carriers and the Western Trunk Lines is now annulled and set aside by the Commis-

sion's order. The Commission's order says, in substance, to the Eastern carriers:

> You have not been paying the Western Trunk Lines sufficient compensation for their services. We have increased this compensation, and your share of the divisions east of the Mississippi River is correspondingly reduced.

Manifestly, the Commission's order operates to reduce the divisions of the Eastern carriers, and this without making them, or any of them, parties to the proceeding, or the taking of any evidence whatsoever with respect to their financial and operating conditions in the light of the requirements of the statute.

This circumstance gives a pointed illustration to the argument advanced in our original brief that the divisions of the Southwestern carriers could not lawfully be reduced for the purpose of granting relief to the Western Trunk Line carriers, without, at the same time, giving consideration to the divisions of the same through rates which were being received by the Eastern carriers and to their financial and operating conditions, in the light of the requirements of Section 15 (6). We argued that the divisions of the Eastern carriers may have been unreasonably large, when tested by the requirements of the statute, in which event the Eastern carriers should be required to contribute to the burden of affording relief to the Western Trunk Lines, instead of placing it all on the Southwestern carriers. The Commission did, in fact, find that the Eastern carriers' divisions were too large on traffic east of the Mississippi River; but this was without hearing or evidence or finding with respect to the Eastern carriers, and without their being parties to the proceeding.

When we consider the very wide discretion vested by the statute in the Commission in determining divisions of joint rates, and that mere justice as between the interested carriers is not controlling, but that the public interest as well must be considered, it necessarily follows that the divisions of one carrier, party to a joint rate, cannot be determined without a consideration of the financial and operating conditions of the other parties to the joint rate in the manner prescribed by statute. The joint rate is an entirety. The divisions are to be determined, not by any hard and fast rule, but in the Commission's discretion, which must extend to all parties to this joint rate. The divisions are inter-dependent. The division of one carrier depends to some extent upon the divisions received by the other parties to the joint rate.

This does not necessarily mean that the divisions of each and every carrier, party to a joint rate, must be fixed and determined, separately, in one proceeding. Where there are three carriers, A, B and C, parties to the joint rate, no doubt the divisions to which carrier A is entitled may be determined without, at the same time and in the same proceeding, fixing the separate divisions of B and C. In thus determining the divisions of carrier A, the problem may be divided into two parts; first, what division is carrier A entitled to; secondly, what division is just, reasonable and equitable to be received by B and C, in the aggregate. The shares to which B and C are separately entitled may be determined in a subsequent proceeding. This was the theory of the *Orient* case and the *New England Divisions* case. But the determination of the divisions of carriers B and C, in the aggregate, manifestly requires a consideration of the divisions which they both

receive, and likewise a consideration of the financial and operating conditions of both of them, in the light of the requirements of the statute. It is clear that the division of carrier A cannot be determined without at the same time giving consideration to the remainder of the joint rate, and to the divisions, in the aggregate, of the carriers entitled thereto. By the same token, the divisions of carrier A and carrier B cannot be determined, under the statute, without giving consideration to the divisions of carrier C and applying the statutory tests. The plain reason is that the divisions of the three companies are interdependent, and the Commission cannot justly fix the divisions of any one or two of them without taking the other or others into consideration. Carrier C's divisions may be found to be too high or too low, when the Commission applies the statutory tests; and, in either event, that would inevitably affect the determination of the divisions of carriers A and B.

We contend, therefore, that the Commission could not lawfully consider and fix the divisions of the Southwestern carriers and the Western Trunk Line carriers without at the same time taking into consideration the divisions of the Eastern carriers, and their financial and operating conditions, in the light of the requirements of the statute. As the Commission in fact undertook to determine the divisions of the Southwestern Lines and the Western Trunk Lines on traffic where the latter acts only as a bridge carrier, and gave no consideration whatever to the Eastern carriers, and refrained from applying to them the statutory tests of Section 15 (6), its action in that behalf cannot be sustained, and its order is invalid.

IV.

The failure of the Commission to prescribe divisions for the Southwestern carriers which would yield them an average of from 17 to 20 per cent. greater average revenue per ton mile on interchanged traffic, than the average ton mile revenue of the Western Trunk Line carriers, and in prescribing divisions which yield only 9 per cent. greater average revenue per ton mile, was due to the Commission's error in failing to take into consideration the longer hauls of the Southwestern carriers and the lower average revenue per ton mile under the Southwestern scale, resulting therefrom.

Some confusion has resulted from the use of the term "cost of service". This occurs in the briefs of counsel, as well as in the opinion of the lower court, and, to some extent, in the reports of the Commission. In the Commission's reports, cost of service is sometimes used in the sense of operating expenses; but "cost of service, including a fair return on investment" is used to indicate an average revenue per ton mile sufficient to cover "operating expenses, taxes, and a fair return".

At page 473 of the Commission's report (R. 78), cost of service is used as the equivalent of operating expenses. It is there said:

> The table below shows the average freight operating expenses per ton mile in 1924 of Class I carriers operating within the two groups.

After setting out the table, the Commission continues:

> These figures indicate that it costs somewhere in the neighborhood of 15 per cent. more per ton mile

to haul freight in the Southwest than in Western Trunk Line territory.

Here it is obvious that operating expenses are meant.

At page 477 (R. 86), the Commission uses the expression "the cost of operation per ton mile, including all expenses, charges and a fair return on investment". This does not mean cost of operation or cost of service in the ordinary sense. A fair return on the investment is neither operating expense nor is it cost of service. An amount of operating revenue sufficient to cover all operating expenses and a fair return on the investment is revenue, pure and simple. It is a misnomer to speak of it as cost of service or as operating expenses.

But at page 475 (R. 82), the Commission sets out a table which shows the constructive average revenue per ton mile, in mills, necessary to be realized by the Western Trunk Lines to earn their operating expenses, taxes, and a return of 5.75 per cent. upon their investments; and the same for the Southwestern Lines. This constructive average revenue per ton mile, in mills, is 12.08 for the Western Trunk Lines and 14.67 for the Southwestern Lines, including in both groups the Santa Fe and Rock Island; or 11.61 for the Western Trunk Lines and 14.88 for the Southwestern Lines, excluding the above carriers from both groups. In making this table, the Commission obviously had in mind its duty under Section 15a of the Interstate Commerce Act to make rates which, after payment of operating expenses, would yield a return of 5.75 per cent. in net railway operating revenue upon the group values. It ascertained the average revenue per ton mile for each group to bring about this result. It found that a greater amount of average revenue per ton mile was necessary to

give to the Southwestern carriers their statutory rights than to give the same rights to the Western Trunk Lines; and that this amount varied from 17 to 20 per cent. The Commission said (R. 83):

> The effect of these figures is to indicate that the cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent. greater in the Southwest than in the Western Trunk Line group, based on averages of 1923 and 1924 operations, and somewhere in the neighborhood of 17 per cent. greater based on 1924 operations.

The expression "cost of service, including a fair return on investment", is obviously not cost of service in the ordinary sense. The Commission was dealing with average revenue per ton mile sufficient to cover operating expenses and a fair return on the investment.

It is clear that the Commission intended to say that in order to comply with Section 15a of the statute and give to the Southwestern carriers their operating expenses and a net return of 5.75 per cent. upon their investment, it was necessary that they should realize an average revenue per ton mile from 17 to 20 per cent. higher than would achieve the same result on the Western Trunk Lines. Perhaps a better expression for what the Commission had in mind would have been "the statutory average revenue per ton mile".

It appeared that the Southwestern carriers were entitled to this higher average revenue per ton mile for reasons which appeared, without dispute, in the Commission's report. The Western Trunk Lines had a 50 per cent. higher density of traffic, which operated greatly to their advantage. The Southwestern carriers had more difficult oper-

ating conditions, reflected in the fact, as above set forth, that it cost somewhere in the neighborhood of 15 per cent. more per ton mile to haul freight in the Southwest than in Western Trunk Line territory.

When the Commission reached the conclusion that the statutory average revenue per ton mile of the Southwestern carriers was from 17 to 20 per cent. greater than that required in the case of the Western Trunk Lines, it attempted to put that decision into execution. This is evidenced not only by the fact that in its opinion it stated that the Southwestern carriers needed greater revenue in that amount, but by its statement (p. 479, R. 88) that, in basing the Southwestern carriers' divisions on 100 per cent. of the Southwestern scale, and the Western Trunk Lines' divisions on 80 per cent. and 87 per cent. of the same scale, it was giving to the Southwestern carriers an advantage of 25 per cent. as to certain traffic and 15 per cent. as to other traffic. It there said:

> It should be borne in mind that under the 80 per cent. basis the assumed rates used south of the gateways are 25 per cent. greater relatively than those used north thereof, and that under the 87 per cent. basis they are 15 per cent. greater.

Again, in the Commission's second opinion, it is said (R. 104):

> The actual figure which we used in arriving at our divisional basis was about 22.5 per cent., for we used 25 per cent. excess for the Southwest on the traffic to and from Illinois and Wisconsin points and 15 per cent. for the remainder of the traffic to and from Western Trunk Line points.

It is fairly plain, therefore, that the Commission, in prescribing divisions in this case, intended to give effect to its finding that the Southwestern carriers were entitled to a higher average revenue per ton mile, on the interchange traffic in question, ranging from 15 to 25 per cent. Its subsequent modification of the Western Trunk Lines' percentage of the Southwestern scale from 80 per cent. to 75 per cent., when applying via the St. Louis gateway, was made in its second opinion. While nothing was said by the Commission as to the effect of the use of 75 per cent., it is a fair inference that, on the traffic to which it applied, it intended that the higher average revenue per ton per mile of the Southwestern Lines on that traffic would be approximately 33⅓ per cent.

But it is equally clear that the Commission's plan miscarried. The actual yield to the Southwestern carriers under the prescribed divisions fell far short of from 17 to 20 per cent.; far short of 15 to 25 per cent., and far short of 22.5 per cent. or 33⅓ per cent. The amount actually realized by the Southwestern Lines, as is clearly shown by the test made in September, 1928, gave them but 9 per cent. more average revenue per ton mile on interchanged traffic than was realized by the Western Trunk Lines.

There is an obvious explanation for this failure of the Commission to realize the effect which its reports indicate it actually intended. That explanation lies in the fact that the hauls of the Southwestern carriers were much longer than the Commission realized, and that, by reason of this length of haul and the diminishing average revenue per ton mile under the Southwestern scale, the revenue realized by the Southwestern Lines fell far short of what the formula was expected to produce.

The Commission assumed that the hauls of the Western Trunk Lines group and the Southwestern group were substantially the same. At page 469 (R. 72) it said:

> It is safe to conclude there were no great differences in average hauls.

This was based on group data and referred to the average hauls between the Western Trunk Lines group and the Southwestern group. Again, in its second report, the Commission said (R. 104):

> Average hauls differ very little.

This latter statement was also based upon system figures, and not upon the interchange traffic in question.

But it has now developed that the hauls differ very materially. The Commission correctly states in its brief (p. 30) that the average haul on the interchange traffic in question was 313.7 miles for the Western Trunk Lines and 471.9 miles for the Southwestern Lines. The average haul of the Southwestern Lines was, therefore, a little more than 50 per cent. greater than the average haul of the Western Trunk Lines. This is disclosed in the test of September, 1928. Data contained in the first report (461-462, R. 63) indicate a considerable difference in the length of haul.

If the Commission had been right in its assumption that the average hauls were substantially the same, it is quite possible that its formula would have worked out as it evidently intended, and would have given to the Southwestern carriers from 15 to 25 per cent. more average revenue per ton mile than for the Western Trunk Lines. This, we think, may be demonstrated with almost mathematical accuracy, and to do so we first go to the Southwestern scale,

which will be found in 123 I. C. C. 477. This is the scale with reference to which the revenues between the two groups of carriers are to be divided under the Commission's formula.

It is interesting to note that under this scale the revenue per ton mile, obtained by computing the cost of one ton for the prescribed number of miles and dividing that sum by the mileage, decreases rapidly as the distance increases. We give the following illustrations:

Number of Miles	*Rate Cents per Cwt.*	*Revenue per Ton Mile in Mills*
50	58	232.0
100	79	158.0
150	97	129.3
200	109	109.0
300	133	80.8
400	157	78.85
460	167	72.6
500	174	69.6
600	192	64.0
700	209	59.7

It will be noted that the revenue per ton mile in mills is much greater than the statutory average revenue per ton mile, above referred to. This is due to the fact that the rates prescribed in the Southwestern scale, which are used by the Commission in its formula for the division of joint rates, are the first-class rates, which are much higher than commodity and other class rates and, of course, much higher than the joint rates under which the interchange traffic in question was moved. The actual yield of revenue per ton mile in mills under this Southwestern scale is of no importance, since no revenue was received under it. Its

only function was to furnish the measure for the division of the joint rates. The only significance in the foregoing statement showing the revenue per ton mile in mills is to indicate graphically that, under the Southwestern scale, as the haul increases, the average yield per ton mile decreases in a rapidly increasing ratio.

If we take typical shipments, where the haul of the Western Trunk Lines is the same as the haul of the Southwestern Lines, we find that the revenue of the Southwestern Lines exceeds that of the Western Trunk Lines by from 15 to 25 per cent., or even 33⅓ per cent., depending on the factor—that is, 87 per cent., 80 per cent., or 75 per cent.—to be used in determining the share of the Western Trunk Lines. For illustration, we assume a carload of merchandise weighing 25 tons moves from a point 300 miles north of Kansas City to a point 300 miles south of Kansas City on a joint rate, and that the total earnings for the movement amount to $260.00. We take 25 tons to the car and $260 as the earnings on the car, for the reason that this was the average tonnage and average revenue per car of all the movements shown in the test of September, 1928 (R. 1226). If we assume a different tonnage or a different earning per car, the resulting average revenue per ton mile may vary; but the relation between the average revenue per ton mile of the Western Trunk Lines and the average revenue per ton mile of the Southwestern Lines will remain constant.

The rate under the Southwestern scale for 300 miles is $1.33 per cwt. The revenue ($260.00), therefore, is to be divided in the ratio of $106.40 (80% of $133.00) to the Western Trunk Lines and $133.00 to the Southwestern Lines—that is, the Western Trunk Lines are to get 106.40/239.40 and the Southwestern Lines are to receive

133.00/239.40. The share of the Western Trunk Lines, thus computed, is $115.55, and the share of the Southwestern Lines is $144.45.

The ton miles north of St. Louis are 7,500; that is, the 25-ton load multiplied by 300 miles; and the ton miles south of St. Louis are the same. The earnings of the Southwestern Lines, therefore, ($144.45 divided by 7,500) were 19.26 mills per ton mile. The earnings of the Western Trunk Lines ($115.55 divided by 7,500) were 15.4 mills per ton mile. The earnings of the Southwestern Lines were 25 per cent. greater than the Western Trunk Lines.

Taking the same illustration as given above, the distances remaining the same, but using a factor of 87 for the Western Trunk Lines instead of 80, the revenue of the Western Trunk Lines will average 16.12 mills per ton per mile, and the revenue of the Southwestern Lines 18.53 mills per ton per mile. In other words, the Southwestern Lines receive 15 per cent. more revenue than the Western Trunk Lines.

Taking the same illustration as given above, the distance remaining the same, but using a factor of 75 for the Western Trunk Lines instead of 80 or 87, the revenue of the Western Trunk Lines would average 14.856 mills per ton per mile, and the revenue of the Southwestern Lines would average 19.80 mills per ton per mile. In other words, the Southwestern Lines receive 33⅓ per cent. more revenue than the Western Trunk Lines.

If the Commission had been correct in its assumption that the average hauls on interchange traffic of the Western Trunk Line carriers and the Southwestern carriers were substantially the same, it is quite likely that its formula would have worked out as it apparently intended; that is, to give the Southwestern Lines revenue in excess of that

realized by the Western Trunk Lines, amounting to 15 per cent. where the factor was 87; 25 per cent. where the factor was 80, and 33⅓ per cent. where the factor was 75.

It is evident that the movements of interchange freight, where the revenue is divided directly in accordance with the Southwestern scale, will, for the same distances, give the same average revenue per ton mile. It is also evident that where, on one side of the equation 100 per cent. of the Southwestern scale is used, and, on the other side, less than 100 per cent., the results will reflect the difference in percentages, provided only the distances are the same. The above illustrations demonstrate this to be true. They might be multiplied indefinitely.

But where the haul of the Southwestern Lines is greater than the haul of the Western Trunk Lines, an entirely different situation is presented. As the haul of the Southwestern carriers increases beyond the haul of the Western Trunk Lines, the average revenue per ton mile realized by the Southwestern carriers is reduced; not merely for the additional distance, but for the entire distance. This is true, because as the distance increases, the average revenue per ton mile decreases rapidly. In order to make the principle entirely clear, we take what may be regarded as an extreme case, and assume movements under the applicable factors, where the haul of the Western Trunk Lines remains at 300 miles, but the haul of the Southwestern Lines is 600 miles. It will be seen that the application of the Commission's formula in such movements will result in the Western Trunk Lines receiving a greater average revenue per ton mile than that realized by the Southwestern Lines, whereas the reverse of this is what the Commission evidently intended.

We assume a shipment of the same car, containing 25 tons, from a point 300 miles north of Kansas City to a point 600 miles south thereof, and that the total revenue from the shipment was likewise $260.00. This will divide under the Commission's formula, as $106.40 (80% of $133.00) is to $192.00 (which is the Southwestern scale for 600 miles). The Western Trunk Lines' share of the revenue, therefore, is $92.70, and the Southwestern Lines' share is $167.30. Dividing $92.70 by 7500 ton miles, the result is 12.36 mills, which is the revenue per ton mile realized by the Western Trunk Lines. Dividing $167.30 by 15,000 ton miles of the Southwestern Lines, the result is 11.15 mills. Had the Commission's formula operated to give to the Southwestern Lines 25% more revenue, their ton mile earnings would have been 15.45 mills, instead of 11.15. But the Western Trunk Lines realize 10.8% more revenue than the Southwestern Lines.

If a factor of 87 for the Western Trunk Lines in the above illustration is used, instead of 80, the distances remaining 300 and 600 miles, respectively, the Western Trunk Lines would receive a revenue per ton mile of 13 mills, and the Southwestern Lines would receive a revenue per ton mile of 10.8 mills. In order to give the Southwestern Lines 15 per cent. more revenue than the Western Trunk Lines, they should have received 14.95 mills, instead of 10.8. In fact, the Western Trunk Lines actually received 20 per cent. more revenue than the Southwestern Lines.

If a factor of 75 for the Western Trunk Lines in the above illustration is used, instead of 80 or 87, the distances remaining 300 and 600 miles, respectively, the Western Trunk Lines would receive a revenue per ton mile of 11.85 mills, and the Southwestern Lines would receive a revenue per ton mile of 11.40 mills. In order to give the South-

western Lines 33⅓ per cent. more revenue per ton mile than the Western Trunk Lines, they should receive 15.80 mills per ton mile, instead of 11.40 mills. In the illustration given, the revenue of the Western Trunk Lines exceeded the revenue of the Southwestern Lines by 4 per cent.

It having been shown that where the respective hauls of the Western Trunk Lines and Southwestern Lines were equal, the Southwestern Lines realized the advantage over the Western Trunk Lines which the Commission evidently intended; and it having also been shown that where the average hauls of the Southwestern Lines is double that of the Western Trunk Lines, the advantage which the Commission evidently intended to give to the Southwestern Lines not only disappears, but that an actual advantage is enjoyed by the Western Trunk Lines over the Southwestern Lines—the exact reverse of what the Commission evidently intended; it remains now to consider the effect upon the average revenue per ton mile of the Southwestern Lines and Western Trunk Lines, respectively, when effect is given to the fact that the average haul of the Southwestern Lines is 471.9 miles and of the Western Trunk Lines 313.7. For convenience in computation, we assume the average haul of the Western Trunk Lines to be 300 miles and that of the Southwestern Lines, 460.

We assume a shipment of the same carload, containing 25 tons, from a point 300 miles north of Kansas City to a point 460 miles south thereof, and that the total revenue from the shipment was $260.00. This will divide, under the Commission's formula, as $106.40 (80% of $133.00) is to $167.00 (which is the Southwestern scale for 460 miles). The Western Trunk Lines' share of the revenue, therefore, is $101.18; and the Southwestern Lines' share is $158.82.

Dividing $101.18 by 7,500 ton miles, the result is 13.49 mills per ton mile, which is the revenue realized by the Western Trunk Lines. Dividing $158.82 by 11,500 ton miles of the Southwestern Lines (25 tons multiplied by 460 miles), the result is 13.80 mills. Had the Commission's formula operated to give the Southwestern Lines 25% more revenue than the Western Trunk Lines, their ton mile earning would have been 16.86 mills, instead of 13.80. Similar results will be obtained by using the factors 87 and 75.

The average revenue per ton mile actually received by the Southwestern Lines exceeded that of the Western Trunk Lines by only 9 per cent., instead of from 17 to 20 per cent., as the Commission intended. It is entirely clear that this miscarriage was caused by the Commission's error in assuming that the hauls were the same.

Although there was before the lower court what we regarded as conclusive proof of the miscarriage of the Commission's formula, it declined to recognize that fact, and approved what the Commission had done. The action of the lower court, we believe, was based upon a confusion of terms and a misapprehension of what the Commission had done, what it endeavored to do, and the failure of its efforts. The lower court said (p. 794, R. 1323):

> Counsel contend that the Commission found that, "The Southwestern respondents are entitled to an average of 17 to 20 per cent. greater revenue per ton mile of freight transported than are the Western Trunk Line respondents." This is not warranted by the actual finding of the Commission, which is that, "Cost of service, including a fair return on investment, was somewhere in the neighborhood of 20 per cent. greater in the southwest than in the Western Trunk line group, based on averages of 1923-1924

operations, and somewhere in the neighborhood of 17 per cent. greater based on 1924 operations."

Cost of service is not analogous to revenue per ton mile. Revenue per ton mile varies of necessity with the length of haul, and the cost of service is made up of the cost of terminal operations, which is substantially the same, regardless of the length of haul and the cost of line haul, which varies materially with the length of haul. The combination of these factors produces the cost per ton mile, which varies with the length of haul, but not in direct ratio.

We respectfully contend that it is perfectly clear that the lower court confused "cost of service", which is nothing more or less than operating expenses, with the average revenue per ton per mile to which the Commission said the Southwestern Lines were fairly entitled in order to be on a parity with the Western Trunk Lines. Operating expenses, whether called "cost of service" or by any other name, are disbursements made by a carrier to pay the cost of operating and maintaining its property. The average operating revenue per ton per mile is the amount of revenue which shippers pay to a carrier per transportation unit —the ton mile—for the transportation service performed. The aggregate of the revenue thus paid by the public to a carrier is measured by the number of transportation units —that is, the number of tons per mile—multiplied by the average revenue per ton mile. The amount of revenue thus paid by the public includes operating expenses, and also provides a return on investment; and return on investment is net railway operating income. This is essentially different from operating expense and from cost of service. It is the profit earned by the enterprise.

The court continues (p. 794, R. 1324):

> It is, however, observed that the average length of haul of the southwestern lines, as reflected by this test, was a little more than 50 per cent. greater than the average length of haul of the western lines. If we may assume the same cost of service in both territories, still the cost per ton mile on traffic for the southwestern lines would be materially less than the corresponding cost for the western trunk lines, for the reason that there is a longer average haul in the southwestern territory. Divisions based on cost of service would therefore yield the southwestern lines the same revenue per ton mile for the longer hauls as the western trunk lines received for their shorter hauls, and hence divisions which would yield the southwestern lines on this traffic 9 per cent. more revenue *per ton mile* than the western trunk lines, the result claimed under the test would reflect a cost of service in the southwest higher than that in the western trunk line territory by much more than 9 per cent.
>
> It seems clear that a formula using the cost per ton mile would, under the circumstances, produce a result unfair to the western trunk lines because of the shorter average haul on these lines.

Here, again, it is entirely clear that the court is confusing cost of service with revenue. This is evidently due, as above stated, to the fact that the Commission uses the expression, "cost of service, including a fair return on investment". This so-called cost of service, as the entire expression plainly indicates, however, is not an operating expense, but a measure of revenue.

When we take the real meaning which the Commission had in mind in using that expression, and compare it with the Commission's statement of the amount of average reve-

nue per ton mile which the Southwestern Lines were entitled to receive, over and above that received by the Western Trunk Lines, it is fairly obvious that the Commission intended by its formula to give to the Southwestern Lines the advantage which its findings indicate they should receive, and that the Commission's purpose failed of achievement because of its assumption that the hauls were the same. Discussion of "cost of service" as indulged by the lower court, and as adopted by counsel in their briefs, is quite beside the case.

Furthermore, the district court also entirely overlooked the fact that the Commission has made no investigation and had no evidence before it showing the cost of operation on account of the traffic moving under these joint rates, nor that the operating costs on account of such traffic decreased with the increasing length of haul; and if so, in what ratio.

V.

Cross appeal of United States and Interstate Commerce Commission.

The granting of an order staying the enforcement of the orders of the Interstate Commerce Commission, pending the appeal, was a matter within the discretion of the district court, and, under the circumstances, was a proper exercise of its discretion.

In this case no temporary injunction in the district court was necessary, for the reason that the Commission postponed the effective date of its order during the pendency of the suit before the district court. The last postponement was until December 1, 1929.

When the appellants filed their petition for appeal on November 27, 1929, they also filed a petition for an order staying the enforcement of the order of the Interstate Commerce Commission until this case should be determined in this Court (R. 133). The three Judges granted the appeal, and also granted a stay order as to the appellants, upon condition that the appellants should file a bond in the sum of $3,000,000.00, which was done (R. 136-138). The reasons stated by the court for granting the stay order were (a) that novel and important questions concerning which there is serious doubt were presented; (b) that on account of the financial condition of some of the respondent railroad companies in Western Trunk Line territory which are in receiverships, petitioners would be in danger of not being able to recover any increased divisions which they might pay to the said Western Trunk Line respondents in the event that the decree of the district court should be reversed on appeal; (c) that irreparable damage might result if the Commission's order is not stayed pending appeal; (d) on account of the effect on the net revenues of the petitioners, and the fact that the said orders of the Interstate Commerce Commission do not apply to all the joint rates between Western Trunk Line and Southwestern territory, which would necessarily cause confusion and necessitate a large amount of labor and expense which should not be incurred unless the validity of the said orders should be upheld on appeal; (e) that the said order had not yet gone into effect, and the *status quo* should be preserved pending appeal; (f) that the public would not suffer in any manner by reason of said stay; and (g) that the rights and interests of the said respondent railway companies in Western Trunk Line territory could be fully and

adequately protected by the execution by appellants of a good and sufficient bond.

The Western Trunk Line respondents later filed a motion in the district court, asking that the said stay order be vacated (R. 1299); but the district court, after hearing and considering the evidence introduced and the arguments of counsel, overruled the motion and continued the stay order in effect (R. 1299-1311).

This Court, in *Virginian R. Co.* v. *United States*, 272 U. S. 658, 671, states that the granting of such a stay should be passed upon by the district court. The court said:

> • • • because such court is "best and most conveniently able to exercise the nice discretion needed • • • the court of three judges, who have heard the whole matter, have read the record, and can pass on the issue (application for a suspension pending the appeal) without additional labor", the determination of the application will ordinarily be left to it.

The reasons justifying the granting of such a stay order are outlined in the *Virginian* case, as follows (p. 673):

(a) That the district court entertains a serious doubt as to the correctness of its own decision;

(b) That some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court;

(c) (p. 674) That the case involves the determination of a question of law which is novel or as to which there may be reasonable doubt.

We have the authority both of the district court and of the Commission that the case involves novel and impor-

tant questions. The district court, as already set forth, stated as the first reason for granting the stay order that "novel and important questions concerning which there is serious doubt are presented by the assignment of errors filed herein which should be reviewed by the Supreme Court of the United States". The Commission, in its report on reconsideration (R. 94), said:

> The issues are so important, however, and they raise so many relatively new and difficult questions that we shall depart from our usual practice and explain in this report not only the reasons for the modifications, but also why rehearing and reargument have been denied.

We are confident that this Court, after considering the briefs and arguments in this case, will also be of opinion that novel and important questions are presented, and that there is serious doubt concerning the correctness of the decision of the Interstate Commerce Commission and the district court.

There were other special reasons warranting the granting of the stay order. It was set forth at length before the district court that the order of the Commission applies only to divisions of revenue from traffic that originates on the line of a Southwestern respondent and terminates on the line of a Western Trunk Line respondent, or vice-versa, and to traffic that originates or terminates at a point on the line of a Southwestern respondent and passes over the line of a Western Trunk Line respondent in the course of transportation to or from certain Eastern territory. As stated on page 5 of our original brief, of the 44 Class I carriers whose railroads are located wholly or partly in Western Trunk Line territory, only 15 were made parties;

and of the 37 Class I carriers in Southwestern territory, only 26 were made parties. None of the Class II or Class III carriers in either territory, of which there are a large number (R. 1237-1244), were made parties. Consequently, the Commission's order as to divisions does not apply to traffic originating or terminating at any point on the lines of the latter. The result, if the Commission's order had gone into effect, would have been that the carriers would have been compelled to make the necessary computations and apply the new basis of divisions to the joint rates on the traffic affected by the order, as above described, and to continue to apply the old basis of divisions as to the remainder of the traffic, which constituted about one-third of the total traffic between Western Trunk Line and Southwestern territory (Petitioners' Exhibit 10, R. 1226). Obviously, it would entail a great deal of labor and expense to put the new basis into effect, and a great deal of confusion, since the old basis of division was to be continued as to much of the traffic; and if the Commission's order should finally be held to be invalid, it would entail a large amount of additional labor and expense in restoring the old divisions.

Other special reasons were that if the increased divisions were paid to some of the Western Trunk Line respondents, it might be impossible to recover those amounts, if the Commission's order was finally held to be invalid; and that this order did not affect rates in which the public was directly interested, but only the divisions. In other words, the interested carriers were fully protected by the bond which was furnished, and the public was also protected by that bond, since its only interest in this case was in preserving the efficiency and financial well-being of the carriers.

This was not a case of emergency. The Interstate Commerce Commission entered upon this proceeding on August 26, 1925 (R. 1173). The taking of testimony was concluded on June 29, 1926 (R. 1103-1169). The case was argued on January 13, 1928, and decided December 10, 1928; and the report on reconsideration was handed down on June 10, 1929 (R. 93). Evidently, there was no emergency which would make it improper to continue the *status quo* pending the appeal to this Court, since the Commission consumed about two years and a half from the time the taking of testimony was closed until it handed down its original report.

We submit that, under the principles laid down in the *Virginian* case, *supra,* the district court had the right in its discretion to grant the stay order.

Previous decisions of this Court also justified the granting of the stay, under the circumstances set forth above.

In *Cotting* v. *Kansas City Stock Yards Co.,* 82 Fed. 850, 857, the court, although dismissing the bill for injunction, at the same time entered an order continuing in force the preliminary injunction for ten days pending the taking of an appeal, and provided further that such injunction would be continued in force until the appeal was heard and determined by the Supreme Court of the United States, if good and sufficient bond were provided. In this case, the court said:

> The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United Stataes, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stockyards company would sustain a

> great and irreparable loss. Under such circumstances, as was said, in substance, by the Supreme Court in Hovey *v.* McDonald, 109 U. S. 150, 161, it is the right and duty of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment, and the question at issue so balanced with doubt, as to justify and require an exercise of the power in question.

This procedure appears to have had the approval of this Court on appeal (183 U. S. 79, 80).

See also:

> *Hovey* v. *McDonald,* 109 U. S. 180, 151, 162;
> *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission,* 222 U. S. 582, 582;
> *Louisville & N. R. Co.* v. *United States,* 227 Fed. 273.

Appellees complain that no notice was given to them that application for a stay would be presented, but there was not time for this, since the appeal was taken November 27, 1929, and the Commission's order, unless stayed, would go into effect on December 1, 1929. This was deemed to be an "extraordinary circumstance" (*Cumberland T. & T. Co.* v. *Louisiana Pub. Ser. Co.,* 260 U. S. 212, 218), excusing the giving of such notice. And, as stated above, the

appellees were later given a hearing upon their motion to vacate the stay order.

Respectfully submitted,

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